

**Industrial TurnAround Corporation and Electrical/Mechanical Services, Inc., its Alter Ego and/or Single Employer and International Brotherhood of Electrical Workers, Local 666, AFL-CIO. Cases 5-CA-23392 and 5-CA-23915**

May 13, 1996

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND FOX

On September 13, 1995, Administrative Law Judge Steven M. Charno issued the attached decision. The Respondents and the General Counsel each filed exceptions, answering briefs, and reply briefs.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order as modified and set forth in full below.<sup>4</sup>

We agree with the judge that the Respondents, Industrial TurnAround Corporation (ITAC) and Electrical/Mechanical Services, Inc. (EMSI), alter egos, violated Section 8(a)(5) and (1) by refusing to abide by the 1992-1994 collective-bargaining agreement negotiated on their behalf by the Virginia Chapter of the National Electrical Contractors Association (NECA).<sup>5</sup>

ITAC President Sidney Harrison signed a Letter of Assent in 1990 on behalf of ITAC. ITAC thereby en-

tered into an 8(f) relationship with the Union, authorized NECA to represent it in collective bargaining, and agreed to be bound by the then current bargaining agreement<sup>6</sup> and by successive agreements unless it gave timely notice of withdrawal. The judge properly found that ITAC had not timely withdrawn bargaining authority from NECA when, in November 1992, Sidney Harrison, its president, created alter ego EMSI to perform electrical work identical in nature to the work formerly done by ITAC's unit employees and unlawfully repudiated the collective-bargaining agreement.<sup>7</sup> Accordingly, we adopt the judge's finding that the 1992-1994 agreement was binding on the Respondents until its expiration on August 31, 1994.

We also adopt the judge's recommended remedy.<sup>8</sup> In addition, we shall order the Respondents to apply the terms of the collective-bargaining agreement to all unit employees employed during the life of the agreement and make them whole for any loss of pay or benefits caused by the unlawful repudiation of the agreement.<sup>9</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth below and orders that the Respondents, Industrial TurnAround Corporation and Electrical/Mechanical Services, Inc., its Alter Ego, Hopewell, Virginia, their officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>1</sup> The Respondents have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>2</sup> The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that Respondents Industrial TurnAround Corporation and Electrical/Mechanical Services, Inc. are alter egos, we have not relied on evidence relating to civil proceedings in the U.S. District Court for the Eastern District of Virginia involving R.M. Harrison Mechanical Corp., Electrical/Mechanical Services, Inc. and the Trustees of the Plumbers and Pipefitters National Pension Fund.

<sup>3</sup> In adopting the judge's conclusion that the Respondents violated Sec. 8(a)(3) by refusing to hire job applicants Dagrosa, Ledford, Burks, Harris, and Kelley, we also rely on the Supreme Court's decision in *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995). There, the Court held that a worker can be a company's statutory employee, even if, at the same time, the worker is a paid union organizer.

<sup>4</sup> We will modify the judge's recommended Order in accordance with our recent decision in *Indian Hills Care Center*, 321 NLRB No. 23 (May 8, 1996).

<sup>5</sup> The 1992-1994 agreement was effective from September 1, 1992, to August 31, 1994.

<sup>6</sup> The 1990-1992 agreement was effective from September 1, 1990, to August 31, 1992.

<sup>7</sup> Sidney Harrison did not submit a notice of withdrawal until May 6, 1993. Pursuant to the terms of the Letter of Assent, the notice of withdrawal was not effective until August 31, 1994. In the meantime, pursuant to the "evergreen" clause in the 1990-1992 collective-bargaining agreement, ITAC continued to apply the terms of that agreement to its unit employees after the agreement expired, and while negotiations were underway for a successor agreement. The 1992-1994 successor agreement was signed on January 25, 1993, effective retroactively to September 1, 1992.

<sup>8</sup> To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondents otherwise owe the fund.

<sup>9</sup> We grant the General Counsel's exceptions to the judge's inadvertent omission from the Order and notice of provisions addressing the unlawful discharges of John Perkins and David Deane and the refusal to hire Thomas Dagrosa, Dudley Ledford, Robert Burks, George Harris, and Ernest Kelley.

We leave to the compliance stage of the proceeding determination of how long the discriminatees would have continued in the Respondent's employ. *Dean General Contractors*, 285 NLRB 573 (1988).

Any additional amounts due to the fringe benefit funds will be calculated according to *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

(a) Refusing to apply the terms of the collective-bargaining agreement expiring August 31, 1994, during the life of the agreement.

(b) Interrogating job applicants concerning their union affiliation.

(c) Constructively discharging employees by conditioning their continued employment on forgoing union representation, as well as those wages and benefits specified in the applicable collective-bargaining agreement.

(d) Refusing to hire job applicants because of their union affiliation.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer John Perkins and David Deane immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any employee hired in their place, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make John Perkins and David Deane whole for any loss of earnings and other benefits suffered, including but not limited to fringe benefit trust funds, as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, offer full employment to Thomas Dagrosa, Dudley Ledford, Robert Burks, George Harris, and Ernest Kelley as journeyman electricians or, if such positions do not exist, to substantially equivalent positions, discharging, if necessary, any employee hired in their place, without prejudice to their seniority or other benefits.

(d) Make Thomas Dagrosa, Dudley Ledford, Robert Burks, George Harris, and Ernest Kelley whole for any loss of earnings and other benefits suffered, including but not limited to fringe benefit trust funds, as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of this Order, remove from their files any reference to the constructive discharges of Perkins and Deane, and the refusals to hire Dagrosa, Ledford, Burks, Harris, and Kelley, and within 3 days thereafter notify them in writing that this has been done and that the constructive discharges and refusals to hire will not be used against them in any way.

(f) Comply with the provisions of the collective-bargaining agreement expiring August 31, 1994, between the Virginia Chapter of the National Electric Contractors Association and International Brotherhood of Electrical Workers, Local 666, AFL-CIO, including the ex-

clusive hiring hall provision, for the period when that agreement was in effect.

(g) Offer full and immediate employment to those work applicants who would have been referred to the Respondents for employment through the Union's hiring hall but for the Respondents' unlawful conduct.

(h) Make whole, to the extent that they have not already done so, applicants and employees who have suffered losses of earnings and other benefits by reason of the Respondents' failure to apply the terms of the collective-bargaining agreement described above, plus interest, in the manner set forth in the remedy section of the judge's decision, as modified here.

(i) Make whole, to the extent that they have not already done so, the appropriate fringe benefit trust funds for losses suffered by reimbursing such funds to the extent that contributions would have been made on behalf of employees and those individuals who would have been referred to work were it not for the Respondents' unlawful failure to use the Union's hiring hall, plus interest, in the manner set forth in the remedy section of the decision.

(j) Make whole those individuals for any losses they may have suffered as a result of the Respondents' failure to make the contributions described in paragraph 2(i) of this Order, plus interest, in the manner set forth in the remedy section of the decision.

(k) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(l) Within 14 days after service by the Region, post at their facility in Hopewell, Virginia, copies of the attached notice marked "Appendix B."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former em-

<sup>10</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ployees employed by the Respondents at any time since March 19 and September 20, 1993.

(m) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

## APPENDIX B

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to apply the terms of the collective-bargaining agreement expiring August 31, 1994, during the life of the agreement.

WE WILL NOT constructively discharge you by conditioning your continued employment on forgoing representation by International Brotherhood of Electrical Workers, Local 666, AFL-CIO, as well as those wages and benefits due you pursuant to an applicable collective-bargaining agreement.

WE WILL NOT interrogate job applicants concerning their union affiliation.

WE WILL NOT refuse to hire job applicants because of their union affiliation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL comply with the provisions of the collective-bargaining agreement expiring August 31, 1994, between the Virginia Chapter of the National Electrical Contractors Association and the Union, including the exclusive hiring hall provision, for the period when that agreement was in effect.

WE WILL, within 14 days from the date of the Board's Order, offer John Perkins and David Deane immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any employee hired in their place, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make John Perkins and David Deane whole for any loss of earnings and other benefits, including but not limited to fringe benefit trust funds, resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer full employment to Thomas Dagrosa, Dudley Ledford, Robert Burks, George Harris, and Ernest Kelley as journeymen electricians or, if such positions do not exist, to substantially equivalent

positions, discharging, if necessary, any employee hired in their place, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Thomas Dagrosa, Dudley Ledford, Robert Burks, George Harris, and Ernest Kelley whole for any loss of earnings and other benefits, including but not limited to fringe benefit trust funds, resulting from our discriminatory failure to offer them employment, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the constructive discharges of Perkins and Deane, and the refusals to hire Dagrosa, Ledford, Burks, Harris, and Kelley, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the constructive discharges and refusals to hire will not be used against them in any way.

WE WILL offer full and immediate employment to those job applicants who would have been referred to us for employment through the Union's hiring hall if it had not been for our unlawful conduct.

WE WILL make whole, to the extent that we have not already done so, any employees and job applicants who have suffered losses of earnings and other benefits by reason of our failure to apply the terms of the collective-bargaining agreement described above.

WE WILL make whole, to the extent we have not already done so, the appropriate fringe benefit trust funds for losses suffered by reimbursing such funds to the extent that contributions would have been made on behalf of employees and those individuals who would have been referred to work were it not for our unlawful conduct.

WE WILL make whole those individuals who have suffered losses as a result of our failure to make the contributions described above.

### INDUSTRIAL TURNAROUND CORPORA- TION AND ELECTRICAL/MECHANICAL SERVICES, INC., ITS ALTER EGO

*James P. Lewis and Peter A. Eveleth, Esqs.*, for the General Counsel.

*David R. Simonsen and Vickey A. Verwey, Esqs.*, of Richmond, Virginia, for the Respondent.

*C. B. Sweeny*, of Richmond, Virginia, for the Charging Party.

## DECISION

STEVEN M. CHARNO, Administrative Law Judge. In response to charges filed on March 19 and September 20, 1993, by Local 666 of the International Brotherhood of Electrical Workers, AFL-CIO (the Union), a consolidated complaint was issued on December 30, 1993, which alleged that Respondents Industrial TurnAround Corporation (ITAC) and Electrical/Mechanical Services, Inc. (EMSI) were alter egos which had violated Section 8(a)(1), (3), and (5) of the Na-

tional Labor Relations Act (the Act). Respondents' answer denied the commission of any unfair labor practice.

A hearing was held before me in Richmond, Virginia, on June 21–24 and August 8–10, 1994.<sup>1</sup> Initial posthearing briefs were submitted by the General Counsel and Respondents under extended due date of October 19, and reply briefs were filed by the General Counsel and Respondents under extended due date of November 18, 1994. In response to the General Counsel's motion, I ordered (1) the record reopened from January 24 to February 6, 1995, for the proffer of exhibits<sup>2</sup> and (2) the parties to file any supplementary briefs concerning the relevance of these exhibits on or before February 21, 1995. The General Counsel made such a filing on the due date.

## FINDINGS OF FACT

### I. JURISDICTION

ITAC, a Virginia corporation with an office and place of business in Hopewell, Virginia, provides industrial engineering services and has performed electrical and sheet metal construction work. During the year preceding issuance of the complaint, ITAC, in the course of its business in Virginia, purchased and received goods valued in excess of \$50,000 from outside the State. I find that ITAC is a building and construction industry employer engaged in commerce within the meaning of the Act.

EMSI, a Virginia corporation with an office and place of business in Hopewell, Virginia, is engaged in mechanical and electrical construction work. During the year preceding issuance of the complaint, EMSI, in the course of its business in Virginia, purchased and received goods valued in excess of \$50,000 from outside the State. I find that EMSI is a building and construction industry employer engaged in commerce within the meaning of the Act.<sup>3</sup>

It is admitted, and I find, that the Union is a labor organization within the meaning of the Act.

### II. ALLEGED VIOLATIONS

#### A. Background

In the latter part of 1992, it was decided that (1) ITAC would discontinue its unionized electrical construction activities, (2) R. M. Harrison Mechanical Corp. (HMC) would terminate its unionized pipefitting operations, and (3) EMSI would be created to engage in nonunion electrical construction and pipefitting.

ITAC was incorporated by Sidney Harrison and began operation as a design engineering and project management company in March 1988. In 1990, it began to perform elec-

trical construction work for a number of customers. On April 2, 1990, Sidney Harrison, who was jointly responsible for ITAC's labor relations policies,<sup>4</sup> executed a Letter of Assent on behalf of ITAC which (1) designated the Virginia Chapter of the National Electric Contractors Association (NECA) as its collective-bargaining representative and (2) agreed to be bound by NECA's collective-bargaining agreement with the Union. The most recent such agreement was effective by its terms from September 1, 1992, to August 31, 1994.<sup>5</sup> By letter dated May 6, 1993, ITAC for the first time submitted notice of its intention to withdraw from NECA and to terminate the 1990 Letter of Assent. Accordingly, I find that ITAC ceased to be bound by the requirements of the Letter of Assent as of August 31, 1994.<sup>6</sup>

HMC was incorporated in Virginia in 1987 by Ray Harrison, Sidney Harrison's younger brother. HMC is owned by Ray and his wife Patricia, who are its sole directors. HMC maintains an office and place of business in a facility shared with ITAC and owned by Harrison Properties, a partnership owned by the Harrison brothers and their wives. HMC performs millwright and rigging, miscellaneous ironwork, and construction equipment rental. Prior to December 1992, HMC also performed pipefitting and mechanical construction work pursuant to a collective-bargaining agreement with Plumbers' and Pipefitters' Local 10.

#### B. The Alleged Relationship of ITAC and EMSI

Around September of 1992, Aaron Gay, ITAC's construction manager, gave the company's owner and president, Sidney Harrison, a comparison of union and nonunion labor costs for a project which ITAC was bidding.<sup>7</sup> Gay explained that a nonunion company could be started to do electrical construction work but warned that Harrison could not own the new company; Harrison expressed interest in the idea.<sup>8</sup>

<sup>4</sup> Sidney Harrison's status as one of two individuals having "primary responsibility for establishing and controlling ITAC's labor relations policy" is confirmed by the September 22, 1993 letter from Respondent's attorney to the Union.

<sup>5</sup> Respondents appear to contend that, because this agreement was not actually signed until January 25, 1993, there was no collective-bargaining agreement or relationship in existence between the inferred expiration of the prior agreement on August 31, 1992, and the date of signing. Respondents cite no authority for their contention, and I have found none. ITAC was obligated by its Letter of Agreement to adhere to the terms of any collective-bargaining agreement negotiated by its agent NECA, and its agent negotiated an agreement explicitly effective upon expiration of the prior agreement. I therefore find that (1) a collective-bargaining relationship existed throughout the period in question and (2) ITAC was bound by the terms of the agreement signed in January, including the provision mandating retroactive effectiveness.

<sup>6</sup> The Letter of Assent effectively provides that it may only be terminated on the anniversary date of the collective-bargaining agreement between NECA and the Union.

<sup>7</sup> Gay credibly so testified.

<sup>8</sup> Kathy Diradour testified to this effect, while Gay did not recall the substance of his admitted conversation with Harrison concerning "competitiveness." Diradour was employed as ITAC's financial manager from August 1990 until April 1993, when she was discharged. Respondents apparently contend that bias is shown by Diradour's unsuccessful suit against ITAC over her discharge and by her attorney's threat that Diradour was preparing to contact the Board and the Department of Labor concerning alleged improprieties by Harrison. I find this contention of bias to be unfounded and

<sup>1</sup> By letter dated August 12, 1994, the General Counsel tendered corrections to his Exhs. 160 and 187 and raised a question as to whether his Exh. 180 had been received in evidence. Absent objection, the tendered corrections are accepted, and I reaffirm my ruling receiving G.C. Exh. 180 in evidence.

<sup>2</sup> The documents tendered by the parties are identified in Appendix A to this decision. Outstanding objections to their admissibility are overruled, and G.C. Exh. 188 and R. Exhs. 53 through 60 are received in evidence.

<sup>3</sup> Findings concerning the jurisdictional status of ITAC and EMSI are based on their admissions concerning their respective purchases in interstate commerce.

Thereafter, Sidney Harrison was the prime mover in the creation of EMSI<sup>9</sup> and, because he felt that ITAC's union contract prevented it from effectively competing with other electrical contractors,<sup>10</sup> Harrison made the unalterable determination that EMSI would be a nonunion shop.<sup>11</sup> Jefferson National Bank, the principal lender to all of the Harrison enterprises, determined that the "primary purpose of establishing EMSI is to get around the union contracts at HMC and ITAC, and thereby to be able to make more competitive bids."<sup>12</sup> EMSI was incorporated on November 9, 1992. On May 6, 1993, ITAC notified the Union that it was "no longer doing construction work."

### 1. Ownership, control, and management

ITAC is owned by Sidney Harrison, who is its president and a corporate director. At all times material, both Richard Starnes and Jon Loftis were vice presidents and directors of ITAC. Glenn Harrison, Sidney Harrison's wife, was ITAC's secretary-treasurer until February 2, 1993, but there is no evidence that she performed any duties in connection with this office. Until November 1992, Aaron Gay was ITAC's project manager and his assistant, William Knight, was the company's construction superintendent. Kathy Diradour was ITAC's financial manager until April 1993. Ray Harrison, while not an officer of ITAC, advised the corporation on construction matters during the period it acted as an electrical contractor.<sup>13</sup>

EMSI's sole shareholder is Glenn Harrison, whose entire investment in the company was made up of funds paid by ITAC to Sidney Harrison.<sup>14</sup> Glenn Harrison has been EMSI's

sole director since that company's inception and was its president between November 9–30, 1992, and from October 1993 to the date of the hearing. These offices notwithstanding, she is unfamiliar with EMSI's operations and employment practices, has no role in its operational management, and does not perform any services for it.<sup>15</sup> Sidney Harrison "organized" EMSI and hired the "appropriate personnel to run that company."<sup>16</sup> On November 6, 1992, he named his wife as EMSI's president and secretary-treasurer,<sup>17</sup> Starnes<sup>18</sup> and Loftis as its vice presidents, and Diradour as its financial manager.<sup>19</sup> At that time, Sidney Harrison instructed Diradour to establish a checking account for EMSI for his use and that of the officers he had selected.<sup>20</sup> Sidney Harrison also selected EMSI's attorney and accountant.<sup>21</sup> On November 9, 1992, Sidney Harrison hired Gay as EMSI's electrical project manager, and Gay worked for both EMSI and ITAC between that time and January of the following year.<sup>22</sup> Also on November 9, Sidney Harrison directed that Knight be transferred from ITAC to EMSI.<sup>23</sup> Gay and Knight each performed the same job<sup>24</sup> at the same salary for both companies.<sup>25</sup> During their first week as employees of EMSI, Gay and Knight remained on ITAC's payroll.<sup>26</sup>

Because HMC experienced a strike and unproductive collective-bargaining negotiations during the fall of 1992, Sidney Harrison approached Ray Harrison during the last week of November, told him of EMSI, and asked whether Ray would be interested in the new company.<sup>27</sup> During the first full week of December, Ray became EMSI's president, HMC ceased doing pipefitting work covered by a union contract and EMSI became a nonunion pipefitting contractor.<sup>28</sup> Sidney and Ray decided to transfer the following management personnel from HMC to identical positions at EMSI without any hiatus in employment: Michael Winchell, vice president;

Diradour to be generally credible for the following reasons: (1) I accept the General Counsel's representation that Board agents sought out Diradour, rather than the reverse; (2) Diradour did not appear eager to volunteer facts damaging to Respondents and the General Counsel was required to resort to leading questions in order to elicit such testimony; (3) Diradour's testimony was consistent with a significant amount of documentary material and was often wholly uncontroverted; and (4) her demeanor while on the stand evidenced sincerity and candor.

<sup>9</sup> Both Harrison brothers testified to this effect.

<sup>10</sup> Glenn Harrison, Sidney Harrison's wife, so testified.

<sup>11</sup> Sidney Harrison admitted his formulation of EMSI's labor policy, and Ray Harrison testified that EMSI's president could not alter that policy.

<sup>12</sup> This and comparable statements are contained in the lender's internal credit memoranda dated January 14, February 26, and March 17, 1993, which were authored by Branch Manager Heather Marston or Vice President John A. Shibut, bank officers who dealt at length with Williams and the Harrisons. Shibut admitted that all of his information concerning the creation of EMSI came from that company's management but testified that his report of the Harrisons' motivation was nothing more than unfounded speculation on his part. Based upon the unlikelihood of a bank officer responsible for a significant credit relying wholly upon surmise concerning the borrower's business purpose and proposed operations and upon my observation of Shibut's discomfort when he testified on the point at issue, I do not credit his attempted exculpation of Respondent. The basis for Marston's adoption of Shibut's determination about Respondents' motivation is not of record.

<sup>13</sup> Ray Harrison's September 16, 1993 affidavit so affirms.

<sup>14</sup> Kathy Diradour's credible testimony that Sidney Harrison instructed her "to withdraw \$100,000 from ITAC and place it into EMSI" was supported by the companies' financial records, and Sidney Harrison admitted in response to a question from the bench that

he and his wife did not have sufficient liquid assets to make the payment to EMSI without receiving the payment from ITAC. Financial documents variously reflect the \$100,000 payment as (1) a debt "due to ITAC" (a characterization confirmed by Ray Harrison), (2) a debt due Glenn Harrison, (3) a debt due Sidney and Glenn Harrison, (4) a capital contribution in exchange for stock, and (5) a combination of equity and debt.

<sup>15</sup> Glenn Harrison's testimony to this effect was supported by Ray Harrison, who testified "she doesn't do anything."

<sup>16</sup> Sidney Harrison so testified on several occasions.

<sup>17</sup> Glenn Harrison resigned her office with ITAC in February 1993 while retaining her position as secretary-treasurer of EMSI.

<sup>18</sup> After the Union wrote to Sidney Harrison stating that it was investigating the relationship of ITAC and EMSI, Starnes resigned his office with EMSI while retaining his position as vice president of ITAC.

<sup>19</sup> Diradour credibly so testified.

<sup>20</sup> Diradour's credible testimony to this effect is supported by the account signature card.

<sup>21</sup> Sidney Harrison testified to this effect.

<sup>22</sup> Ray Harrison and Gay so testified.

<sup>23</sup> Sidney Harrison so testified.

<sup>24</sup> Gay so testified.

<sup>25</sup> Ray Harrison so testified.

<sup>26</sup> ITAC's payroll records so indicate.

<sup>27</sup> The Harrison brothers so testified.

<sup>28</sup> Ray Harrison so testified.

Susan Williams, financial manager;<sup>29</sup> and Patricia Carden, job cost analyst.<sup>30</sup>

The following facts shed additional light on the nature of Sidney Harrison's role in EMSI's management. When Sidney Harrison initially specified the individuals authorized to write checks on behalf of EMSI; he was the only one of them who did not hold a formal position with the company.<sup>31</sup> On January 20, 1993, he became co-guarantor on a \$150,000 line of credit to EMSI.<sup>32</sup> On February 12, 1993, he became an unpaid consultant to EMSI because the company's principal lender "wanted to have somebody to talk to that at least could understand what the business was."<sup>33</sup> In that capacity, he was involved in EMSI's day-to-day operations<sup>34</sup> and was again authorized to write checks on its account.<sup>35</sup> Early in 1993, Sidney agreed with Ray Harrison on the interest rate EMSI would pay on a loan from HMC.<sup>36</sup> Sidney Harrison gave directions to Ray Harrison when the latter was EMSI's president.<sup>37</sup> In October of 1993, Sidney Harrison resigned his consultancy and Ray Harrison resigned as president.<sup>38</sup> Thereafter, Sidney gave instructions to Vice President Winchell, defined the scope of Winchell's new authority, and hired Ray as a consultant to oversee the management of EMSI's day-to-day operations.<sup>39</sup> ITAC's organizational chart dated October 1993 depicted EMSI as a division of ITAC responsible to Sidney Harrison.<sup>40</sup>

## 2. Operations

Both ITAC and EMSI performed the same kind of electrical construction work.<sup>41</sup> Before EMSI was created, ITAC served the following customers in central and southeastern Virginia: Allied, Firestone Fibers, Georgia Pacific, Goldschmidt Chemical, Harrison Properties, Hoechst-Cel-

anese, ICI, Nabisco Brands, Nestle, Petersburg Housing authority, Solite Corporation, Stone Container, Union Camp, and Van Water & Rogers.<sup>42</sup> By November 1992, ITAC stopped bidding electrical construction jobs<sup>43</sup> and Sidney Harrison determined that any outstanding work would be transferred to EMSI if the customers did not object.<sup>44</sup> ITAC explained to its customers that it had formed EMSI, a new, nonunion electrical, and mechanical construction company which would subcontract work from ITAC.<sup>45</sup> Thereafter, ITAC subcontracted outstanding electrical construction work for 10 of its customers to EMSI<sup>46</sup> and ceased all such work by January 1993.<sup>47</sup> Potential customers of EMSI were informed that, until it received necessary licenses, work would be performed under purchase orders in ITAC's name.<sup>48</sup> Former ITAC personnel continued to supervise the electrical construction jobs taken over by EMSI.<sup>49</sup> In 1993, ITAC informed its industrial engineering customers that EMSI is "our construction arm"<sup>50</sup> and gave EMSI preferential treatment by charging a 66-percent lower markup for work subcontracted to EMSI than it charged for work by unrelated subcontractors.<sup>51</sup> Over 70 percent of EMSI's electrical projects during 1993 were performed for ITAC (directly or under subcontract) or for ITAC's former customers,<sup>52</sup> and ITAC was directly responsible for over 45 percent of EMSI's total sales during that year.<sup>53</sup>

ITAC and EMSI have the same lawyer, accountant, bank, insurance company, and workers' compensation carrier.<sup>54</sup> During November 1992, Diradour served as financial manager of both ITAC and EMSI but, pursuant to Sidney Harrison's instructions, billed all her work to ITAC.<sup>55</sup> During 1992 and 1993, the individual who acted as EMSI's receptionist and answered its telephone was a full-time employee of and compensated only by ITAC.<sup>56</sup> Williams, while a full-time employee of EMSI during 1992 and 1993, provided accounting, financial, and computer software assistance and advice to ITAC, which did not reimburse EMSI for William's

<sup>29</sup> Williams replaced Diradour as financial manager after the latter had filled the position for approximately 1 month.

<sup>30</sup> Ray Harrison's testimony about the decision was confirmed by Diradour.

<sup>31</sup> Diradour's credible testimony to this effect is supported by the checking account signature cards.

<sup>32</sup> The relevant documentation is of record. The credit memorandum prepared by EMSI's lender stated that ITAC and HMC could not guarantee EMSI's loans because the "Harrisons want to avoid any direct connection between their existing companies (ITAC and HMC) and EMSI in order to reduce the possibility of legal problems over the union contracts."

<sup>33</sup> Sidney Harrison so testified.

<sup>34</sup> Glenn Harrison so testified.

<sup>35</sup> This authority is contained in a corporate resolution which is in evidence.

<sup>36</sup> Sidney Harrison so testified.

<sup>37</sup> Ray Harrison so testified. Given Glenn Harrison's lack of familiarity with EMSI's business, I reject the suggestion that Sidney merely acted as a spokesman for his wife. See fn. 15 and accompanying text.

<sup>38</sup> Ray Harrison admitted that his resignation of the presidency in favor of Glenn Harrison was motivated by a lawsuit which ultimately found EMSI to be a disguised continuation of HMC's discontinued pipefitting operations.

<sup>39</sup> Sidney Harrison so testified, Ray Harrison admitted that his duties as a consultant to EMSI after October 1993 were identical with his duties as EMSI's president.

<sup>40</sup> This document, which was referred to in the General Counsel's brief as Exh. 128, was identified and received in evidence as G.C. Exh. 173.

<sup>41</sup> Ray Harrison so affirmed.

<sup>42</sup> This finding is based on EMSI's records, Ray Harrison's affidavit, and the uncontroverted testimony of Gay and John Perkins, an ITAC employee.

<sup>43</sup> Sidney Harrison testified to this effect.

<sup>44</sup> Diradour credibly so testified.

<sup>45</sup> Kevin O'Hara, Goldschmidt Chemical's vice president of operations, credibly testified to this effect.

<sup>46</sup> Based on EMSI's records, as supplemented by Gay's testimony, these customers were Firestone Fibers, Goldschmidt Chemical, Hoechst-Celanese, ICI, Nabisco Brands, Nestle, Petersburg Housing authority, Solite Corporation, Stone Container, and Union Camp.

<sup>47</sup> Sidney Harrison testified to this effect.

<sup>48</sup> HMC's December 4, 1992 letter to Philip Morris is of record.

<sup>49</sup> Respondents' documents demonstrate that Gay and Knight supervised projects first for ITAC and later for EMSI at Nabisco Brands, Petersburg Housing Authority, and Solite Corporation and that Gay individually supervised projects at Firestone Fibers and bid projects at Stone Container for both ITAC and EMSI.

<sup>50</sup> ITAC's February 9, 1993 letter to ICI Films is of record.

<sup>51</sup> ITAC's January 12, 1993 bid to ICI Films is of record.

<sup>52</sup> EMSI's records indicate that 42 of the 58 electrical jobs which it undertook during 1993 were for ITAC or ITAC's customers.

<sup>53</sup> Ray Harrison so testified.

<sup>54</sup> The Harrison brothers so testified.

<sup>55</sup> Diradour credibly so testified without controversy.

<sup>56</sup> Ray Harrison so affirmed.

work.<sup>57</sup> While paid exclusively by EMSI between November 1992 and the beginning of January 1993, Gay continued to represent ITAC both by bidding electrical construction projects and by supervising ITAC's employees.<sup>58</sup> Between December 7, 1992, and February 1993, Cecil Mabe, a laborer hired by and reporting to Gay, was simultaneously on the payrolls of both ITAC and EMSI.<sup>59</sup> Similarly, HMC's former employees continued during 1993 to perform work for HMC after they were employed and paid solely by EMSI.<sup>60</sup>

When EMSI was formed, its business address and offices were located at 922 East Randolph Road in Hopewell, a Harrison Properties' building in which ITAC and HMC also leased space. Initially, Gay and Knight continued to use the area which had been ITAC's electrical shop. For EMSI's first 10 months of operation, it used office equipment and furnishings which were borrowed, without compensation, from ITAC and HMC. On November 9, 1992, EMSI began using the three trucks which ITAC had used for electrical construction work.<sup>61</sup> There is no evidence that ITAC was compensated for EMSI's use of these trucks during 1992.<sup>62</sup> Sometime during the first half of 1993, a document purporting to be a lease of the trucks from ITAC to EMSI was prepared and backdated to January 1; EMSI failed to provide the insurance coverage required by this document and did not reimburse ITAC for insurance costs (ITAC renewed and paid for the policy in April 1993) or make payments under the lease until the end of 1993.<sup>63</sup> Also from the outset of EMSI's operations, it used ITAC's tools and equipment worth between \$2000 and \$2500;<sup>64</sup> EMSI did not pay ITAC for these tools.<sup>65</sup>

### 3. Discussion

The General Counsel contends that (1) EMSI's electrical construction business is a disguised continuance of ITAC's electrical construction operations; (2) ITAC and EMSI are therefore alter egos; and (3) for the period from November 6, 1992, to August 31, 1994, EMSI should be required to recognize the Union and assume ITAC's obligations under the collective-bargaining agreement between NECA and the Union. See *Advance Electric*, 268 NLRB 1001, 1004 (1984). Alter ego status may be found to exist where only a portion of the predecessor's business is transferred to the new enterprise, *NLRB v. Don Burgess Construction Co.*, 596 F.2d 378, 385 (9th Cir. 1979), *enfg.* 227 NLRB 765 (1977), and where

<sup>57</sup> Williams so testified but professed an inability to recall how much time she spent on ITAC's work.

<sup>58</sup> Gay so testified.

<sup>59</sup> Mabe's testimony to this effect was supported by Respondents' payroll records.

<sup>60</sup> On affidavit and in testimony, Ray Harrison identified himself, Winchell, Williams, and Carden in this regard. In February 1994, HMC reimbursed EMSI for the estimated value of the work done for HMC by Williams and Carden in 1993.

<sup>61</sup> The foregoing findings are based on the affidavit and testimony of Ray Harrison.

<sup>62</sup> ITAC's vice president, Loftis, testified that there was no lease in effect during 1992.

<sup>63</sup> Williams so testified.

<sup>64</sup> This finding is based on Gay's testimony and Ray Harrison's affidavit.

<sup>65</sup> Diradour's credible testimony to this effect is corroborated by Ray Harrison's affidavit.

the operations transferred from the predecessor are only a portion of the new enterprise's total business, *Continental Radiator Corp.*, 283 NLRB 234, 237 (1987).<sup>66</sup> Generally, the Board finds an alter ego to exist where two enterprises have "substantially identical" business purpose, operations, equipment, customers, management, supervision, and ownership. E.g., *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).<sup>67</sup>

Examination of the relevant business purpose and operations in this case reveals entities engaged in exactly the same business in exactly the same market: electrical construction in central and southeastern Virginia. EMSI's completion of jobs begun by ITAC, as well as EMSI's role as ITAC's favored subcontractor and "construction arm," insured the existence of substantially identical customer bases for the two entities. EMSI's managers commenced operations in ITAC's office and electrical shop, and the two companies thereafter shared a business address and premises. From its inception, EMSI used tools and equipment provided without charge by ITAC. EMSI's expenses for trucks, as well as certain insurance and payroll costs, were paid throughout 1993 by ITAC which was never reimbursed for the time value of the money thus expended. See *Ristorante Donatello*, 314 NLRB 693, 699 (1994); *Advance Electric*, supra at 1002. The two entities use the same suppliers of legal, accounting, insurance and banking services. See *Farmingdale Iron Works*, 249 NLRB 98, 106-107 (1980). The Board has long held that, for the purpose of determining alter ego status, "substantially identical" ownership exists where, as here, the stock of two corporations is owned by members of the same family. *Vinisa II, Ltd.*, 308 NLRB 135, 137 (1992); *Advance Electric*, supra at 1004; *Shield-Pacific, Ltd.*, 245 NLRB 409, 415 (1979); and *Crawford Door Sales Co.*, supra.

Turning to the final question of whether the two companies share management and supervision, it appears undisputed that the day-to-day electrical construction operations of ITAC were directly supervised by Gay and Knight under the overall management of Sidney Harrison, who was also responsible for ITAC's labor policy. Gay and Knight were also the managers and supervisors of EMSI's electrical construction operations, where their duties were identical with those performed for ITAC. The record demonstrates that Sidney Harrison is a de facto manager of EMSI. His effective control of EMSI is shown by (1) his formulation of a labor relations policy for EMSI which was not subject to modification by the company's president; (2) his selection of EMSI's initial and subsequent officers; (3) his demonstrated ability to give instructions to EMSI's president, vice president, and fi-

<sup>66</sup> The May 4, 1994 Findings and Conclusions, together with the December 5, 1995 Judgment and Order, in *Trustees of the Plumbers and Pipefitters National Pension Fund. v. R. M. Harrison Mechanical Corp. and Electrical/Mechanical Services, Inc.*, Civil Action No. 3:93cv524, U.S. District Court for the Eastern District of Virginia, constitute a judicial determination that EMSI was a disguised continuance of HMC's discontinued pipefitting operations and that EMSI and HMC were alter egos. Accordingly, my discussion will not explore EMSI's pipefitting operations nor on the legal relationship between HMC and EMSI.

<sup>67</sup> The Fourth Circuit Court of Appeals in *Alkire v. NLRB*, 716 F.2d 1014, 1020 (1983), has held that the predecessor must have benefited from the transfer of business to the new enterprise; this burden is met where, as here, the elimination of a labor obligation is a motive for the transfer.

nancial manager; (4) his hiring of EMSI's electrical construction supervisors; (5) his provision of initial capital and loan guarantees for EMSI, without which the company would not have been financially viable; and (6) his ability to write checks on EMSI's account, even during periods when he held no admitted position with the company. Given the fact that Glenn Harrison had no familiarity with EMSI's operations nor any role in its operational management, I find that Sidney Harrison did not engage in the foregoing activities because he was carrying out her instructions. Based on the foregoing, I find the management and supervision of the two companies to be "substantially identical." See *NLRB v. McAllister Bros., Inc.*, 819 F.2d 439, 444-445 (4th Cir. 1987); *D.I.C. Mfg. Co.*, 294 NLRB 426, 434 (1989); *Farmingdale Iron Works*, supra at 106.

In addition to the considerations set out above, it is relevant to determine whether EMSI was created in order to evade ITAC's responsibilities under the Act, such as recognition of the Union or adherence to a collective-bargaining agreement. See *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982). The overwhelming evidence of record establishes that Sidney Harrison created EMSI in order to rid himself of ITAC's contractual obligation to pay union wages and benefits. This finding as to motivation is supported by the fact that EMSI's commencement of electrical construction operations began with the termination of substantially identical operations by ITAC. See *Continental Radiator Corp.*, supra at 237.

For the foregoing reasons, I find that EMSI was created as the alter ego of ITAC in violation of Section 8(a)(5).<sup>68</sup> I therefore conclude that Respondents' May 6, 1993 repudiation of the collective-bargaining agreement violated Section 8(a)(5) of the Act and that the terms of that agreement were binding on EMSI from the time it commenced operations until August 31, 1994. See *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

#### C. Alleged Interrogation

Pursuant to a Virginia Employment Commission referral, journeyman electrician Thomas Dagrosa visited EMSI on November 13, 1992, in search of employment.<sup>69</sup> Dagrosa met with Gay who asked Dagrosa about prior job experience. When Dagrosa named his past employers, Gay commented that the companies were all union contractors and asked: "Are you Union?" Dagrosa responded affirmatively, and Gay stated: "If we hire anybody, we'll get in touch with you."<sup>70</sup> I find that Gay's question in the context of an em-

ployment interview with a complete stranger tended to be coercive and is violative of Section 8(a)(1) of the Act. See *Active Transportation*, 296 NLRB 431 fn. 3 (1989); and *Cook Bros. Enterprises*, 288 NLRB 387, 397 (1988).

#### D. Alleged Constructive Discharges

During November or December 1992, Gay told ITAC employees John Perkins and David Deane that ITAC had run out of electrical construction work and did not intend to bid for more.<sup>71</sup> By the end of the year, ITAC had laid off all its electrical construction workers except Perkins and Deane. On January 3, 1993, Gay called Perkins into his office, brought up EMSI, and asked how Deane felt about working nonunion, stating that the job would pay "basically the same" but would be without benefits. Perkins made it very clear that he was not interested in working for a nonunion company.<sup>72</sup> Gay laid off Perkins on January 3 and Deane on January 6. Respondents concede that "Gay discussed the situation with both Perkins and Deane . . . and both declined because of their unwillingness to work for a non-signatory company."<sup>73</sup> When Respondents unlawfully conditioned continued employment by Perkins and Deane upon their foregoing union representation and giving up the wages and benefits specified in the union contract, the cessation of employment which resulted from the electricians' refusal to accept Respondents' conditions was a constructive discharge in violation of Section 8(a)(3) of the Act. See *Watt Electric Co.*, 273 NLRB 655, 659 (1984); and *Advance Electric*, supra. Respondents' purported willingness thereafter to hire Perkins and Deane is without significance since every offer of reinstatement explored on the record was implicitly subject to the same unlawful conditions set out above.

#### E. Alleged Refusals to Hire Union Applicants

As a result of Dagrosa's November 1992 interview at EMSI, his name, address, and telephone number were placed on the company's list of applicants for the positions of electrician and electrician/helper, together with the notation: "EMERGENCY ONLY/L.U." Ray Harrison indicated that the notation would have been made by the manager in charge of electricians at that time (i.e., Gay) and conceded that the quoted initials "possibly could be" a reference to Dagrosa's union status. In the absence of any evidence to the contrary, I so find.<sup>74</sup> In late February 1993, Dagrosa was again referred to EMSI by the Virginia Employment Commission, at which time Gay indicated that the company would be hiring in March.<sup>75</sup> EMSI's applicant list reflects receipt of

inflation of the respective signatures of Knight and Gay. In sum, I credit Dagrosa.

<sup>71</sup> Deane credibly so testified without controversy.

<sup>72</sup> Perkins' credible account of the conversation was not contested.

<sup>73</sup> Respondents' Opening Brief at 14.

<sup>74</sup> At the hearing, counsel for the General Counsel suggested the inference that the initials "L.U." referred to Dagrosa's union membership. When Ray Harrison was unable to positively confirm or deny the truth of the inference, I indicated to Respondents that I would be inclined to adopt the inference unless there was testimony as to the notation's meaning from the manager who made it. Respondents offered no testimony or other evidence on this point.

<sup>75</sup> Gay's testimony that he did not hire Dagrosa because of the latter's weight runs counter to what Gay told Dagrosa at the two

<sup>68</sup> Given the finding in text, Respondents' contention concerning the General Counsel's alleged failure to perfect service is moot. See *Il Progresso Italo Americano Publishing Co.*, 299 NLRB 270, 289 (1990). Respondents did not cite any legal authority in support of their contention that inclusion of an allegation of alter ego status in the caption of this case constituted a denial of due process. I have been unable to find any authoritative basis for that contention and therefore reject it.

<sup>69</sup> The referral card is of record.

<sup>70</sup> Dagrosa so testified without controversy. While Dagrosa was mistaken as to the date of the interview, his memory for other details was remarkably clear. For example, he recalled that Gay had signed Knight's name to the referral card, a statement supported by exam-

Dagrosa's second application. Although EMSI hired at least 10 electricians between the time of Dagrosa's first application and May 1, 1993,<sup>76</sup> it did not hire Dagrosa.<sup>77</sup>

Journeyman electrician Dudley Ledford submitted a January 15, 1993 job application to EMSI, and his name, address, and telephone number were placed on the company's applicant list.<sup>78</sup> All of the employers listed on Ledford's application were union contractors. EMSI did not hire Ledford,<sup>79</sup> but it did hire at least seven electricians between the date of his application and May 1, 1993.<sup>80</sup>

Journeyman electricians Robert Burks, George Harris, and Ernest Kelley, all of whom were in layoff status from jobs as electricians, submitted May 20, 1993 job applications to EMSI in response to the Union's request that they attempt to organize EMSI.<sup>81</sup> All three wore union insignia when they visited the company, and each of their applications explicitly set forth their membership in the Union and listed prior employment with union contractors. When they tendered their applications and inquired whether any hiring was taking place, the company's representative stated that EMSI was a nonunion company,<sup>82</sup> it was not hiring at that time and it was unlikely to be hiring in the future.<sup>83</sup> While EMSI did not hire Burks, Harris, or Kelley, it did hire three new electricians during the 2 weeks following their applications and a total of 25 electricians between May 20 and the end of 1993.<sup>84</sup> Between the outset of its electrical construction operations and the time of the hearing, EMSI hired only one member of the Union and that individual was delinquent in the payment of union dues when hired.<sup>85</sup>

The record demonstrates that (1) the five individuals named above filed applications for employment with EMSI during periods when it was hiring electricians, (2) EMSI knew that each of the five was a member of the Union, and (3) EMSI's animus toward the Union is established by Respondents' creation of an alter ego, the unlawful repudiation

interviews and is inconsistent with the notation on EMSI's applicant list. Accordingly, I do not credit Gay on this point.

<sup>76</sup> This finding is based on EMSI's 1993 employee list.

<sup>77</sup> I credit Dagrosa's testimony that his telephone answering machine did not record a June 1994 call from EMSI, and I find his testimony to be entitled to greater weight than Respondents' proffer of hearsay evidence to the contrary. The length of time between Dagrosa's interviews and June 1994 suggests that any such call would be irrelevant to the question of Respondents' liability for violations of the Act in November 1992 and February 1993. In addition, a call made during the same month in which the trial in this proceeding commenced may well have been made in anticipation of litigation and is, therefore, without probative value.

<sup>78</sup> The date of Ledford's application appears on the applicant list.

<sup>79</sup> Ledford testified that EMSI called him around the beginning of June 1994 to indicate that they were accepting employment applications. I find that call to be of little relevance or probative value. See fn. 77, *supra*.

<sup>80</sup> This finding is based on EMSI's 1993 employee list.

<sup>81</sup> Harris and Kelley so testified.

<sup>82</sup> Burks and Harris credibly so testified without controversy.

<sup>83</sup> The credible, uncontroverted testimony of Harris and Kelley concerning hiring was supported by Burks.

<sup>84</sup> This finding is based on EMSI's 1993 employee list.

<sup>85</sup> While Winchell testified that he was unaware of ever hiring a union member, the Union's associate business manager, Butch Vest, credibly testified that he had compared EMSI's employment records with the Union's membership records and found a single individual who appeared on both.

of a collective-bargaining agreement, the interrogation of Dagrosa, and the discriminatory discharges of Perkins and Deane. For the foregoing reasons and because EMSI lied to the applicants concerning the availability of jobs, I infer that EMSI acted from antiunion animus when it failed to hire Dagrosa, Ledford, Burks, Harris, and Kelley. See *J. E. Merit Constructors*, 302 NLRB 301, 303-304 (1991). Because Respondents proffered no probative evidence of any motivation to the contrary, I conclude that EMSI's refusal to hire the five union electricians was violative of Section 8(a)(3) of the Act.<sup>86</sup> This conclusion is not altered by the fact that Burks, Harris, and Kelley were laid-off electricians sent by the Union to organize EMSI's electrical construction operations.<sup>87</sup> See *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991).

#### CONCLUSIONS OF LAW

1. Respondents ITAC and EMSI are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent EMSI is, for the purpose of this proceeding, the alter ego of Respondent ITAC.

4. All employees of Respondents performing electrical work within the jurisdiction of the Union constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

5. For the period September 1, 1992, through August 31, 1994, the Union was the exclusive bargaining representative of the employees in the appropriate unit within the meaning of Section 9(a) of the Act.

6. By interrogating a job applicant concerning his union affiliation, Respondent EMSI has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

7. By constructively discharging employees John Perkins and David Deane, Respondent ITAC has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

8. By refusing to hire job applicants Thomas Dagrosa, Dudley Ledford, Robert Burks, George Harris, and Ernest Kelley, Respondent EMSI has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

9. By the following acts, Respondents ITAC and EMSI have engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act: (a) creating EMSI as an alter ego of ITAC and (b) failing to abide by the provisions of Respondents' collective-bargaining agreement with the Union.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

<sup>86</sup> Respondents appear to contend that a statement made by a union official during this proceeding on June 24, 1994, somehow justified Respondent's refusals to hire the discriminatees in 1992 and the first half of 1993. Unlike the situation in the case cited by Respondents, *O'Daniel Trucking Co.*, 313 NLRB 18, 22 (1993), there is no suggestion here that (1) the union official's statement preceded the alleged violation or (2) Respondents could have relied on or been motivated by that statement. Accordingly, I reject Respondents' contention as a post hoc rationalization.

<sup>87</sup> The cases cited by Respondents on brief, all of which held that paid union organizers were not bona fide applicants and employees within the meaning of the Act, are factually inapposite.

## REMEDY

Having found that Respondents engaged in unfair labor practices, I shall order them to cease those practices and to take certain affirmative action designed to effectuate the purposes of the Act. Respondents will be ordered to (1) offer full and immediate reinstatement to John Perkins and David Deane and to make them whole for any loss of pay or benefits caused by Respondents' discrimination against them; (2) offer full and immediate employment to Thomas Dagrosa, Dudley Ledford, Robert Burks, George Harris, and Ernest Kelley and to make them whole for any loss of pay or benefits caused by Respondents' discrimination against them; (3) comply with the exclusive hiring hall provisions of the parties' collective-bargaining agreement for the period when that agreement was in effect; and (4) offer full and immediate employment to those job applicants who would have been referred to Respondents for employment through the Union's hiring hall were it not for Respondents' unlawful conduct<sup>88</sup> and to make those applicants whole for any loss of earnings and other benefits they may have suffered by reason of Respondents' unlawful acts.<sup>89</sup> Backpay is to be computed as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondents shall also be ordered to make whole the Union's fringe benefit trust funds by reimbursing such funds to the extent that contributions would have been made on behalf of those individuals who would have been referred to work were it not for Respondents' unlawful failure to use the Union's hiring hall and to make

<sup>88</sup> This remedy is required to "recreate the conditions and relationships that would have been had there been no unfair labor practices." *J. E. Brown Electric*, 315 NLRB 620, 623 (1994).

<sup>89</sup> Any individuals on the Union's "out of work list" who were denied an opportunity to work for EMSI because of Respondents' repudiation of the collective-bargaining agreement should be made whole. *R. L. Reisinger Co.*, 312 NLRB 915 (1993).

those individuals whole for any losses they have suffered as a result of Respondents' failure to make such contributions, *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enf'd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed above.

[Recommended Order omitted from publication.]

## APPENDIX A

EXHIBITS RECEIVED AFTER THE HEARING  
CLOSED*General Counsel's Exhibit:*

No. 188. December 5, 1995 Judgment and Order in *Trustees of the Plumbers and Pipefitters National Pension Fund. v. R. M. Harrison Mechanical Corp. and Electrical/Mechanical Services, Inc.*, Civil Action No. 3:93cv524, U.S. District Court for the Eastern District of Virginia (*Plumbers' Pension* case)

*Respondents' Exhibit:*

No. 53. May 4, 1994 Order in the Plumbers' Pension case.

No. 54. May 4, 1994 Findings of Fact and Conclusions of Law in the Plumbers' Pension case.

No. 55. January 3, 1995 Joint Notice of Appeal in the Plumbers' Pension case.

No. 56. January 17, 1995 Docket in the Plumbers' Pension case.

No. 57. January 17, 1995 Transcript Order in the Plumbers' Pension case.

No. 58. January 17, 1995 Docketing Statement and Appendix in the Plumbers' Pension case.

No. 59. January 17, 1995 Certification of appeal in the Plumbers' Pension case.

No. 60. April 12, 1995 Order accepting settlement in the Plumbers' Pension case.